No. 15-674

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *ET AL.*,

Petitioners,

v.

STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, MONTANA, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WEST VIRGINIA, WISCONSIN; PAUL R. LEPAGE, GOVERNOR, STATE OF MAINE; PATRICK L. MCCRORY, GOVERNOR, STATE OF NORTH CAROLINA; C.L. "BUTCH" OTTER, GOVERNOR, STATE OF IDAHO; PHIL BRYANT, GOVERNOR, STATE OF MISSISSIPPI; BILL SCHUETTE, ATTORNEY GENERAL, STATE OF MICHIGAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF SENATE MAJORITY LEADER MITCH MCCONNELL AND 42 OTHER MEMBERS OF THE UNITED STATES SENATE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici curiae are Senate Majority Leader Mitch McConnell and 42 other members of the United States Senate (listed in Appendix A). As members of the Senate, *amici* have an unquestionable interest in protecting the legislative powers that Article I of the Constitution confers upon the Congress of the United States. *See* U.S. Const. art. I, § 1. ("All legislative Powers herein granted shall be vested in a Congress of the United States."). The Constitution provides Congress with the powers to "establish an uniform rule of Naturalization," to regulate interstate and foreign commerce, and to prescribe all such laws as are Necessary and Proper for carrying those powers into execution. *Id.* art. I, § 8. In exercise of those powers, Congress has enacted a comprehensive scheme for the regulation of legal and illegal aliens in the United States, including providing standards and procedures that determine when they may work in this country and when they may enjoy benefits provided from the public fisc. Because the Executive's orders contravene the letter and the spirit of the immigration laws, and threaten the separation of powers enshrined in the Constitution, *amici* submit this brief in support of Respondents.[1]

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state no counsel for a party authored this brief, in whole or in part. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court "has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (internal quotation marks and citation omitted). Indeed, all "[p]olicies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress." *Arizona* v. *United States*, 132 S. Ct. 2492, 2507 (2012). Congress has exercised its legislative authority to create an "extensive and complex" scheme for regulating admission to the United States, the presence of aliens in the United States, and the circumstances under which aliens may obtain employment or receive government benefits. *Id.* at 2499.

Over the course of more than six decades, Congress has devoted substantial attention to Title 8 of the United States Code and passed numerous laws, which together fill six volumes of the U.S.C.A. The present immigration scheme is premised, in substantial part, on ensuring that immigration does not create unsustainable competition with U.S. citizens for jobs or overwhelm the public fisc by imposing undue demands on governmental benefits. *See, e.g.*, 8 U.S.C. § 1324a note. Congress also has devoted substantial attention and resources to protecting our borders and to deterring unlawful entry into our country.

The Executive has a constitutional duty to faithfully execute the immigration laws and, in so

doing, may implement rules for the administration of those laws. Yet Congress has never given the Executive unchecked discretion to rewrite federal immigration policy or to fashion its own immigration code. In this case, the Executive sought to do precisely that by granting "lawful presence"—and the governmental benefits that come with it—and work authorization to over four million aliens who are ***illegally*** present in the United States and who are otherwise barred from working here or receiving federal benefits under the statutes that Congress has enacted.

There is little doubt that the Executive adopted the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program as part of an explicit effort to circumvent the legislative process.[2] Prior to issuing DAPA, the President had repeatedly "push[ed] for legislation" to alter the immigration laws by, among other things, granting legal status to the vast majority of the 11 million aliens illegally present in the United States.[3] The President ultimately proved unsuccessful, however, in persuading Congress to enact any of those proposals.

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[2] Along with the DAPA program, the Executive announced the expansion of its Deferred Action for Childhood Arrivals ("DACA") program, which was first announced on June 12, 2012. The DACA expansion is subject to challenge by the Respondents in this case, and is unlawful for the same reasons discussed herein.

[3] *See, e.g.*, The White House, *Taking Action on Immigration*, https://www.whitehouse.gov/issues/immigration/ (describing the President's unsuccessful "push for legislation" as a precursor to "his immigration accountability executive actions").

In response, just two weeks after American voters elected a majority of Republicans in both the House and the Senate in the November 2014 election, the President abandoned his effort to persuade the voters' elected representatives of the wisdom of his position, and instead chose to implement his policy preferences by the extra-constitutional assertion of a unilateral executive power. With millions of illegal aliens not permitted to remain in this country, work in this country, or receive government benefits pursuant to federal law, the Executive decided to provide such privileges to them anyway through administrative fiat.

In defending the authority to implement DAPA, the Executive points neither to the Constitution, nor to any express grant of statutory authority, but relies upon "prosecutorial discretion." *See, e.g.*, U.S. Br. at 42–47. Yet this case is not about prosecutorial priorities or the use of the Department of Homeland Security's ("DHS") finite resources. This case is about the Executive's unilateral determination, not simply to leave individual aliens alone, but to confer upon a broad class of illegal aliens the authorization to work and to receive federal benefits that the laws of this country nowhere provide. It is one thing for the Executive to prioritize the deportation of certain aliens, but wholly another to declare affirmatively that over four million illegal aliens may remain in the United States "lawfully" and receive benefits to which the laws do not otherwise entitle them.

Congress has taken great care in the immigration laws to identify the circumstances under which foreign nationals may receive authorization to work, to impose measures that deter illegal immigration,

and to identify when aliens may receive lawful status based upon their relatives' immigration status. The Immigration Reform and Control Act of 1986 "'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law.'" *Hoffman Plastic Compounds, Inc.* v. *N.L.R.B.*, 535 U.S. 137, 147 (2002) (quoting *INS* v. *Nat'l Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 & n.8 (1991)). To that end, the immigration laws speak comprehensively to the categories of persons authorized to receive work permits, their numbers are intentionally limited, and, with few discrete exceptions, they are restricted to lawful entrants. There is simply no reasonable way to conclude that 8 U.S.C. § 1324a, the statutory section that prohibits the employment of illegal aliens, gave the Executive a blank check to grant work authorization to illegal aliens, or even legal aliens not otherwise authorized to work, whenever and however it sees fit.

Indeed, the reasoning advanced by the Executive has no limiting principle. If the Executive can, in the exercise of "prosecutorial discretion," grant lawful presence indefinitely to approximately 40% of the aliens in the United States illegally, then what stops it from extending this "discretion" further to include all, or nearly all, of those present, in stark violation of the laws that Congress has passed? What stops the Executive from granting work permits to any and all foreign nationals in the United States beyond the limits set forth in statute? The Solicitor General pointedly does not say.

For decades, Congress has acted with great care to prescribe the categories of foreign nationals who may enter this country, who may remain, who among

them may be allowed to obtain employment, and who may enjoy benefits under federal law. To elevate the Executive's policy preferences above those encoded in federal law would eviscerate the comprehensive scheme that Congress has enacted, and disrupt the balance of powers between the political branches.

DAPA reflects an unmistakable effort to take action that is "incompatible with the expressed or implied will of Congress," *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring in the judgment), and correspondingly contravenes both the immigration laws and the Executive's constitutional duty to Take Care that the laws be faithfully executed.

Given that the Executive has asserted that the acts challenged here are not even subject to judicial review, what is at stake in this matter is nothing less than an effort to supplant Congress's constitutional power to "establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8. Such an action stands in stark contravention to federal law and to the constitutional principle of the separation of powers.

ARGUMENT

I. DAPA UNLAWFULLY INFRINGES ON CONGRESS'S AUTHORITY TO REGULATE IMMIGRATION.

As this Court has recognized, the "Federal governance of immigration and alien status is extensive and complex." *Arizona*, 132 S. Ct. at 2499. "***Congress*** has specified categories of aliens who may not be admitted to the United States," *id.* (citing 8 U.S.C. § 1182) (emphasis added), and "***Congress***

has specified which aliens may be removed from the United States and the procedures for doing so," *id.* (citing 8 U.S.C. § 1227) (emphasis added). Congress has addressed the problem of illegal immigration by rendering unlawful entry and reentry federal offenses, *id.* (citing 8 U.S.C. §§ 1325, 1326), requiring registration for aliens in the United States, *id.* (citing 8 U.S.C. §§ 1301–1306), and prohibiting illegal immigrants from entering the work force or enjoying federal benefits, *id.*

Congress also has addressed the circumstances implicated by DAPA: the immigration laws specifically define when illegal aliens may obtain a lawful immigration status, when they may be considered to be in a period of lawful presence, and when they are entitled to benefits attendant to lawful status and presence, based upon their children's immigration status. Pet. App. 71a–74a. And Congress similarly has provided that the Secretary may cancel the removal and adjust the status of an illegal alien to that of a lawful permanent resident if certain conditions are met, such as demonstrating that the alien's removal would result in "exceptional and extremely unusual hardship" to a close relative, such as a child, who is a United States citizen or a lawful permanent resident. 8 U.S.C. § 1229b(b)(1)(D).

While immigration officials have the discretion to pursue, or not to pursue, removal in individual cases, DAPA goes well beyond such discretion. DAPA purports to supplant detailed and limited statutory provisions with a regime of the Executive's own creation, which would allow, under conservative estimates, at least four million illegal aliens, and

potentially more if the program were expanded, to obtain the benefits of lawful presence, indefinitely, in contravention of the existing statutes. Because Congress has comprehensively defined which foreign nationals are entitled to admission to the United States, and who among them are entitled to benefits and employment in this country, DAPA is an unauthorized and invalid exercise of executive power that contravenes federal immigration law and unlawfully usurps the legislative power of the United States.

A. Congress Has Established a Detailed Legislative Scheme To Manage the Number of Aliens Lawfully Present and Authorized to Work in the United States.

Since the passage of the Immigration and Naturalization Act of 1952 (the "INA"), Pub. L. 82-414, 66 Stat. 163, Congress has implemented and maintained a "single integrated and all-embracing system" to regulate aliens' lawful admission to, and continued presence in, the territory of the United States. *Arizona*, 132 S. Ct. at 2501–02 (internal quotation omitted); *see* 8 U.S.C. §§ 1151–54, 1184. Far from leaving the evolution of federal immigration policy to the Executive, Congress has amended the INA numerous times over the past 60 years to address public concerns with the functioning of the immigration system. Time and again, Congress has made significant changes to our immigration laws in the Immigration and Nationality Act of 1965, Pub. L. 89-236, 79 Stat. 911, the Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102, the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. 99-603, 100 Stat. 3445, the

Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546.

The basic structure of our immigration system, however, has remained consistent since the INA's enactment. The INA prohibits any alien from entering the territory of the United States unless the alien is admitted as an immigrant, nonimmigrant, or refugee, or is otherwise paroled into the United States. 8 U.S.C. §§ 1181(a), 1182(d)(5)(A). Aliens admitted as nonimmigrants are admitted for a limited time, and may not remain in the United States after their period of admission ends. *Id.* §§ 1184(a), 1202(g), 1327(a). The INA defines an "immigrant" as an individual admitted to the United States for the purposes of maintaining permanent residence, and a "nonimmigrant" as an alien admitted to the United States for one of several enumerated purposes. *Id.* § 1101(a)(15). The INA sets strict limits on the issuance of immigrant visas, *id.* § 1151, and identifies the permissible purposes for which the Executive may issue nonimmigrant visas. *Id.* §§ 1101(a)(15), 1184(a). The INA permits an alien admitted as a nonimmigrant to apply for an "adjustment of his status to that of an" immigrant pursuant to the standards and procedures prescribed therein. *Id.* §§ 1255, 1255b. Aliens present in the United States for longer than 30 days must register with the Executive; the alien must supply certain information under oath and report any change of address to the immigration authorities. *Id.* §§ 1201(b), 1302, 1305.

While the basic framework of the INA remains intact, Congress has repeatedly returned to it to delineate the scope of who should be admitted and permitted to remain in the United States, in what numbers, and under what conditions. The INA has always reflected Congress's judgment that, while immigration provides important benefits to the country, the law must provide sensible limits upon the number of foreign nationals entering, particularly when it comes to their potential to work here and compete for jobs with American citizens.

The INA therefore limits the number of immigrant visas granted because of family sponsorship (based on a formula that runs between 226,000 and 480,000), for purposes of employment (140,000), and for diversity purposes (55,000). *See* 8 U.S.C. § 1151(a), (c)–(d).[4] The INA similarly limits the number of nonimmigrant visas for most temporary workers, such as those who may be admitted annually under the H-1B program. *Id.* § 1184(g).[5]

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[4] These limits expressly do not apply to "immediate relatives" of U.S. citizens, which only underscores that when Congress wants to exempt a class of foreign nationals from immigration restrictions, it expressly does so.

[5] For example, a base cap of 65,000 H-1B visas is fixed by statute, but an additional 20,000 visas are statutorily authorized for foreign nationals who have earned a master's degree or higher from a school in the United States. *Id.* § 1184(g)(5)(C). There is also an express exemption to this cap for those "employed at an institution of higher education . . ., or a related or affiliated nonprofit entity." *Id.* § 1184(g)(5)(A)–(B). The specificity of these caps (and the exemptions to them) again demonstrates that Congress has not broadly delegated its

The INA provides for additional categories of immigrants, such as refugees, who are not subject to the general limitations on visas. Yet even here, Congress has made clear that there must be limits on Executive discretion. For example, in the Refugee Act of 1980, Congress provided "a permanent and systematic procedure for the admission . . . of refugees of special humanitarian concern to the United States." 8 U.S.C. § 1521 note. The law originally limited the number of refugees to 50,000 per year for the first three years, but for subsequent years also provided for procedures pursuant to which, after "appropriate consultation" with Congress (which include cabinet-level officials conferring with Senate and House committee chairmen), the President may increase that number based on humanitarian concerns or the national interest. *Id.* § 1157(a)(1). Thus, when Congress sought to ease limits on the admission of certain foreign nationals and grant the Executive discretion in implementing that policy, it affirmatively did so by statute. Even then, Congress did not write a blank check, but required that the Executive continue to consult in setting the appropriate number of refugees to be admitted each year.

Against this comprehensive backdrop, Congress has devoted substantial attention and appropriated funds to the problems caused by the growing number of illegal aliens who enter this country in violation of our laws and in contravention of the numerical limits that protect American workers. In IRCA, which was enacted in 1986, Congress "'forcefully' made

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authority to determine who can enter and stay in this country to the Executive, but instead closely manages those restrictions.

combating the employment of illegal aliens central to '[t]he policy of immigration law.'" *Hoffman Plastic Compounds*, 535 U.S. at 147. IRCA represented the most significant alterations to federal immigration law since the enactment of the INA.

IRCA implemented this policy by making it unlawful for any employer to hire an alien without lawful employment authorization. 8 U.S.C. § 1324a(a). IRCA also implemented an employment verification system requiring employers to obtain documentation of potential employees' employment authorization and for any potential employees to attest to his or her work authorization under penalty of perjury. *Id.* § 1324a(b).

IRCA's policy goal to prevent the employment of illegal aliens in this country remains unchanged and reflects Congress's concern that such employment unfairly incentivizes aliens to flout our immigration laws and places undue wage pressures on the American labor market. *See, e.g.*, 131 Cong. Rec. S7035-01 (May 23, 1985) (remarks of Sen. Simpson, Chairman, Senate Immigration and Refugee Subcommittee of the Judiciary) ("[I]llegal immigration depresses the wages and working conditions of U.S. workers."); H.R. Rep. No. 99-682(I), at 47 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5651 (Report of the Judiciary Committee) ("Since most undocumented aliens enter this country to find jobs, the Committee believes it is essential to require employers to share the responsibility to address this serious problem. The need for control is underscored by international demographics. Undocumented aliens tend to come from countries with high population growth and few employment

opportunities. The United States is not in a position to redress this imbalance by absorbing these workers into our economy and our population. U.S. unemployment currently stands at 7%, and is much higher among the minority groups with whom undocumented workers compete for jobs most directly."). IRCA also specifically required the Executive to provide annual reports during the first three years after its implementation on the impact that illegal immigration and enforcement have on "the employment, wages, and working conditions of United States workers and on the economy of the United States." 8 U.S.C. § 1324a note.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") similarly demonstrated Congress's desire to curb illegal immigration. IIRIRA imposed a three-year bar on the admission of any alien who had previously been unlawfully present in the United States for between 180 days and one year, and a ten-year bar on admission of any alien who had previously been unlawfully present in the United States for one year or more. 8 U.S.C. § 1182(a)(9)(B). Thus, IIRIRA added important sanctions for aliens who enter the country unlawfully or who remain here without authorization.

Congress's policy objective in passing IIRIRA was clear: Illegal immigrants will continue to seek to come into this country so long as there are economic incentives for them to do so. Accordingly, it was necessary to reduce those incentives and to increase the sanctions that may come from breaking our laws. *See* H.R. Conf. Rep. No. 104-828, at 127 (1996) ("It is a compelling government interest to remove the

incentive for illegal immigration provided by the availability of public benefits."). By effectively granting illegal immigrants the work authorization that they would otherwise lack, DAPA stands in direct conflict with Congress's stated policy objectives under IIRIRA and effectively renders the statute a nullity for almost half of the unlawfully present immigrants in the United States.

B. DAPA Conflicts With the Provisions of the INA Addressing When Family Ties May Confer Lawful Presence.

DAPA not only rests upon the kind of statutory authority that the Executive has otherwise been denied by the INA, but as the Court of Appeals recognized, it also conflicts with specific provisions that permit the Secretary to adjust the status of relatives of U.S. citizens and lawful permanent residents under very narrow circumstances.

As a general matter, an illegal alien seeking to obtain a lawful immigration status from his or her child's immigration status is obliged to leave the United States, wait ten years, and then obtain a family-preference visa from a United States consulate, just like other foreign-born parents of United States citizens. *See* Pet. App. 72a–73a. By contrast, DAPA does not require any waiting period or any effort to apply and obtain a limited number of family-preference visas. *See id.* DAPA also applies to the parents of lawful permanent residents even though such aliens would not qualify under any of the family-based immigrant preference categories under the INA.

Congress also has authorized the Executive to cancel the removal and adjust the status of a limited number of illegal aliens who are the parents of citizens or lawful permanent residents where the alien:

> A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
>
> B) has been a person of good moral character during such period;
>
> C) has not been convicted of [certain criminal offenses]; and
>
> D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's . . . child.

8 U.S.C. § 1229b(b)(1). Notably, Congress has placed tight limits on the number of illegal aliens who may receive such relief.[6] At most, DHS may grant

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[6] When it enacted IIRIRA, Congress required a showing of "exceptional and extremely unusual hardship" to the alien's United States citizen or lawful permanent resident relatives for cancellation of removal, a "significantly higher" standard than the former "extreme hardship" standard for suspension of deportation prior to IIRIA. *Matter of Andazola-Rivas*, 23 I. & N. Dec. 319, 324 (B.I.A. 2002). This heightened standard has been interpreted to require that the alien show that removal would cause "hardship to an alien's [United States citizen or lawful permanent resident] relatives . . . 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country."

cancellation of removal to "4,000 aliens in any fiscal year." *Id.* § 1229b(e)(1).

In marked contrast, DAPA does away with nearly all of those limitations and provides lawful presence for approximately four million illegal aliens who:

1. have, as of November 20, 2014, a son or daughter who is a citizen or lawful permanent resident;

2. have continuously resided in the United States since before January 1, 2010;

3. are physically present in the United States on November 20, 2014, and at the time of making a request for consideration of deferred action;

4. have no lawful status on November 20, 2014;

5. are not an enforcement priority as reflected in the Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Pet. App. 420a–429a); and

6. present no other factors that make the grant of deferred action inappropriate.

Pet. App. 417a. Thus, in place of Congress's ten-year physical presence requirement, DHS has shrunk that requirement to under four years and in fact, requires physical presence in the United States only on two dates. DAPA does not require an applicant to establish that relief is justified by any "exceptional and extremely unusual hardship" to the applicant's

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Matter of Monreal-Aguinaga, 23 I. & N. Dec. 56, 62 (B.I.A. 2001).

citizen or lawful permanent resident child. And of course, DAPA relief is not limited to 4,000 aliens per year, but is unlimited by its own terms and may apply to more than four million, or even millions more if the program is expanded. In so doing, the Executive has effectively negated Congress's authority to implement an orderly immigration system that protects citizens from unchecked competition by foreign workers.

The Solicitor General argues that DAPA remains consistent with these statutory directives because "lawful presence" is more limited than lawful permanent residence, and because these benefits may be withdrawn by the same unilateral executive discretion that conferred them. U.S. Br. at 62. To say, however, that DAPA falls short of the potential benefits under the program that Congress authorized is not to say that DAPA is consistent with it. Congress plainly could have enacted DAPA into law, had it chosen to do so. It did not. And the proposition that Congress silently conferred upon the Secretary the authority to grant work authorization to four million illegal aliens is not credible.

Congress has clearly and directly spoken to when illegal aliens may adjust their status on the basis of their family connections to United States citizens and lawful permanent residents, and the Executive has no authority to create an entirely new and different program, providing similar benefits, in a manner that would circumvent the limits of the statute.

The implications of DAPA are even more troubling. The Executive here has purported to act in connection with over four million illegal aliens,

who have lived in the United States illegally for a number of years, and who have family connections to United States citizens. Much of the Solicitor General's defense of DAPA on the merits is devoted to explaining the wisdom of the Secretary's policy and the "responsible" and "weighty humanitarian and policy concerns" that underlie it. U.S. Br. at 43–47.

Yet the rationale that the Solicitor General has defended in this case is not so limited. The Executive here has claimed the unilateral authority to grant deferred action, work authorization, and federal benefits without any practical limit. For instance, Congress has placed limits (with certain expressly stated exceptions) on the number of individuals who may be admitted to the United States for the purpose of seeking temporary employment as highly skilled workers under the H-1B visa program. According to the Executive, however, it could unilaterally circumvent these limitations by granting employment authorization to applicants for temporary employment visas who do not qualify for (or are not exempted from) the statutory numerical limits.

Moreover, foreign nationals who are admitted as nonimmigrant temporary agricultural (H-2A) or nonagricultural (H-2B) guestworkers must generally be sponsored by an employer, and that employer must show that their employment will be at or above the prevailing wage, and they are generally restricted to working for only the sponsoring employer. By contrast, the Executive effectively eliminates these requirements through DAPA for nearly half of the illegal aliens present in the United

States, many of whom would likely take the sort of jobs that are normally filled by H-2A or H-2B guestworkers. Moreover, if the Executive's asserted discretionary authority were endorsed, it could purport to establish unilaterally a program for an unlimited number of applicants to work in the United States indefinitely for any employer and without regard to the impact of the presence of these employees on the employment of citizens.

DAPA, therefore, conflicts with Congress's comprehensive immigration policy both because it violates the substantive and numerical limitations on the ability of aliens to seek lawful presence and employment authorization in the United States and because the legal justification for the program would permit the Executive to, at its pleasure, ignore the legal and administrative restrictions on the circumstances in which it grants lawful presence and employment authorization to massive numbers of aliens.

C. Section 1103(a)(3) Does Not Provide Authority for DAPA.

In seeking to defend DAPA, the Executive invokes the Secretary's general authority to "establish such regulations" and "perform such other acts" as are "necessary for carrying out his authority under the provisions of this chapter." 8 U.S.C. § 1103(a)(3). Yet the Secretary's authority is expressly limited to carrying out the provisions of the statute, and that authority has never been as unfettered as the Executive now contends.

The Executive relies heavily upon its pre-IRCA actions involving predecessors to deferred action, but

does not claim that these examples were ever reviewed by any court, much less this Court, for their conformity to the INA. In any event, those examples predate Congress's comprehensive prohibition upon the employment of illegal aliens, thus saying nothing about whether DAPA is consistent with the immigration laws post-IRCA.

Indeed, Congress has never provided the Executive with the kind of discretionary authority over immigration policy that has been asserted here. For instance, the Executive relies upon the history of "extended voluntary departure," pursuant to which the President on three occasions permitted "otherwise deportable aliens to remain temporarily in the United States," because of wartime conditions in their countries. U.S. Br. at 48–49. Shortly after IRCA, however, Congress codified the practice in terms that precluded any inference that the Executive had, much less still has, such unfettered discretion.

In the Immigration Act of 1990 ("IMMACT"), Congress created Temporary Protected Status, which allows the Executive to permit certain foreign nationals to remain in the United States and receive work authorization in certain extraordinary circumstances, such as when ongoing armed conflict or natural disasters occur in their state of origin. 8 U.S.C. § 1254a. Yet far from ratifying the purportedly inherent power of the Executive to grant work authorization in connection with deferred action, Congress expressly provided that Temporary Protected Status is "the ***exclusive*** authority of the [Secretary] to permit aliens who are or may become otherwise deportable . . . to remain in the United

States temporarily because of their particular nationality or region of foreign state of nationality." *Id.* § 1254a(g) (emphasis added).

Congress similarly has granted authority to the Secretary in a number of areas that indicate that his regulatory authority is considerably more cabined than claimed here. For example, DHS is given specific authority to issue regulations relating to "[t]he admission to the United States of any alien as a nonimmigrant," 8 U.S.C. § 1184(a)(1), to establish a visa waiver program, *id.* § 1187, and to waive visa ineligibility for certain aliens who would ordinarily be excludable for public health reasons, *id.* § 1182(g)(1), (3). Each of these specific grants of authority, however, is accompanied by detailed qualifications and restrictions on the conditions under which the Executive may modify or add additional criteria to the statutory qualifications for admission or exclusion. None of these grants is similar to the kind of inherent authority under Section 1103(a)(3) that the Secretary contends would permit the grant of lawful presence and work authorization under DAPA.

D. Section 1324a(h)(3) Does Not Provide Authority for DAPA.

Faced with this comprehensive and reticulated regime to regulate the employment of aliens in the United States, the Solicitor General relies heavily upon a single phrase in the "miscellaneous" provisions of IRCA as evidence that Congress implicitly recognized the Executive's authority to provide work authorization to any and all aliens. Specifically, the Solicitor General claims that IRCA

implicitly permits the Executive to "authorize[ ]" the employment of each and every alien in the country because of IRCA's exclusion of aliens "authorized to be" employed "by the Attorney General," from its definition of "unauthorized alien." U.S. Br. at 53 (citing 8 U.S.C. § 1324a(h)(3)).

As an initial matter, it strains credulity that Congress would grant the Executive such unfettered discretion as part of a statute—IRCA—that had as its principal purpose the limitation of the employment of unlawful aliens. The assertion by the Executive that Section 1324a(h)(3) "accepted and ratified the INS's preexisting understanding that it could authorize aliens to work" without regard to other affirmative grants of authority is simply not credible. U.S. Br. at 54.[7]

In fact, as the Solicitor General now appears to concede, Section 1324a(h)(3) does not speak to the authority of the Secretary at all. U.S. Br. at 63 ("Section 1324a(h)(3) did not create the Secretary's authority to authorize work; that authority already existed in Section 1103(a)."). Rather, it merely defines "unauthorized alien" for the purpose of the statute's bar on the employment of unauthorized aliens and recognizes an unauthorized alien to be

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[7] In enacting IRCA, Congress established a "one-time legalization program" for "aliens who have been present in the United States for several years." H.R. Rep. No. 99-682(I) at 49. Congress's "one-time" grant of legalization, at the same time as it otherwise barred the employment of illegal aliens, rendered highly suspect the proposition that it would recognize a free-floating executive authority to grant work authorization in the future.

someone other than a lawful permanent residence or a person who has otherwise received a work permit.

In contending that Congress has endorsed past Executive practice, the Solicitor General also points to a loose patchwork of stray statutory provisions and regulations to support its supposed authority to grant work authorization to each and every alien in the United States. For example, the Solicitor General asserts that "by the early 1970s, the INS's ordinary practice was to authorize 'illegal aliens' to work when it decided not to pursue deportation." U.S. Br. at 51–52. The article cited by the Solicitor General to support this assertion, however, explained that the justifications for granting work endorsements included things such as asylum eligibility, imminent issuance of an immigrant visa, and the pendency of an application to transition to lawful permanent resident status that apply to a "miniscule sub-class of aliens" unlawfully residing in the United States. *See* Sam Bernsen, *Leave to Labor*, 52 No. 35 INTERPRETER RELEASES 291, 294 (Sept. 2, 1975); *Berger* v. *Heckler*, 771 F.2d 1556, 1575–76 (2d Cir. 1985).

In any case, this practice was repudiated by IRCA in 1986. As the Solicitor General recognizes, until 1986, it was not illegal to employ an unauthorized alien, and so the "work endorsements" did not grant any legal benefit other than providing comfort to potential employers. U.S. Br. at 51–52. For this same reason, the various other practices cited by the Solicitor General regarding work authorization that predate IRCA's sea-change on this issue to prohibit the employment of illegal aliens cannot be accorded any deference. *See id.*

In an effort to avoid this fate, the Solicitor General argues that the former INS's rulemaking post-IRCA supports its assertion that Congress delegated to it plenary power to authorize employment for undocumented workers. *Id.* at 54. Specifically, in the wake of IRCA, the Executive promulgated additional rules governing which aliens, if hired, would not subject employers to penalties under IRCA. *See* Control of Employment of Aliens, 52 Fed. Reg. 16,216, 16,226–28 (May 1, 1987) (codified at 8 C.F.R. § 274a.12(a)–(c)). Most of the categories of aliens included already possessed legal status, but it also includes categories of aliens who did not. *See, e.g.*, 8 C.F.R. § 274a.12(c)(14).

As discussed in more detail below, the Executive cannot justify DAPA by relying upon the work authorizations authorized by 8 C.F.R. § 274a.12, because the fifteen categories of aliens covered by that regulation are authorized by, or incidental to, the provisions of the INA. *See infra* at pp. 30–33. It is telling, however, that in connection with the categories authorized by the post-IRCA rule, the Executive emphasized that the number of undocumented workers eligible for work authorization "is relatively small and was previously considered to be not worth recording statistically." Employment Authorization; Classes of Aliens Eligible, 52 Fed. Reg. 46,092, 46,093 (Dec. 4, 1987). The Executive went on to defend the regulation because, unlike DAPA, "[t]he total number of aliens authorized to accept employment is quite small" and "the impact on the labor market is minimal." *Id.* at 46,092. Thus, in promulgating those rules, the Executive assured Congress that it was not inconsistent with IRCA's objectives and would have

"minimal" impact on the U.S. labor market. The Executive provides no such assurance with respect to DAPA, nor could it.

E. In Contrast to DAPA, Past Deferred Action Programs Were Limited, Went Unreviewed, and Were Consistent With Congressional Intent.

The Executive cannot justify DAPA by pointing to any express grant of statutory authority. Instead, the Executive attempts to discover authority in the penumbras of the INA by claiming that Congress has previously approved of the use of "deferred action" on a class-wide basis in the past, and therefore implicitly consented to the Executive's use of deferred action to justify DAPA. Putting aside the notion that the separation of powers may be altered though "acquiescence," *see, e.g.*, *I.N.S.* v. *Chadha*, 462 U.S. 919 (1983), an examination of previous "deferred action" programs, and the ways in which Congress has responded to them, demonstrates that federal law does not permit the Executive unilaterally to impose its own policy preferences above those of the Congress.

The first class-wide purported "deferred action" program cited by the Executive and its *amici*, the Family Fairness Program, was, in fact, no "deferred action" program at all. IRCA granted temporary resident status to a number of aliens who were present in the United States, but had no lawful status under federal immigration law. IRCA permitted these aliens to remain in the United States and to later apply for adjustment of status to permanent residence. IRCA did not, however,

extend the same temporary status to the spouses or children of those who qualified under IRCA. In order to prevent the removal of the alien spouses and children of those eligible for temporary resident status who did not also independently qualify for that relief, the Executive issued guidance purporting to grant them voluntary departure and work authorization. J.A. 213–15 (Memorandum of Gene McNary, *Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouse and Children of Legalized Aliens* (Feb. 2, 1990)). Contrary to the circumstances presented here, voluntary departure was a remedy expressly provided for by IRCA, 8 U.S.C. § 1254(e), and the Family Fairness Program was "interstitial to a statutory legalization scheme." Pet. App. 83a.

Moreover, Congress did not remain silent in response to this program. With the enactment of the IMMACT, Congress replaced the Family Fairness Program with a Family Unity provision that granted a temporary stay of deportation and work authorization for the spouses and children of aliens granted temporary resident status under IRCA. While providing similar relief as the Family Fairness Program, IMMACT in no way endorsed broad executive discretion in this area; it nullified it.

IMMACT also significantly cabined the Executive's discretion by creating Temporary Protected Status as the future vehicle for the Executive to temporarily permit classes of illegal aliens to remain in the country. Temporary Protected Status allows the Executive to permit certain aliens to remain in the United States and receive work authorization in certain extraordinary

circumstances, such as when ongoing armed conflict or natural disasters occur in their state of origin. 8 U.S.C. § 1254a. Notably, the Executive never again used extended voluntary departure and, indeed, Congress subsequently curtailed such action pursuant to IIRIRA. *See* U.S. Br. 49 n.9; 8 U.S.C. § 1229c(a)(2)(A) (mandating that the Executive could grant no longer than 120 days of voluntary departure).[8] Rather than serving as an example of its acquiescence to broad executive discretion, Congress's response to Family Fairness was robust and assertive. Congress changed the immigration laws in several, pointed ways to significantly curtail future similar freelancing efforts by the Executive.

Notably, prior to DACA and DAPA, class-wide "deferred action" had been utilized by the Executive on only four occasions. The Executive now claims that these programs received express Congressional approval and demonstrate Congress's implicit acquiescence to DAPA. Each of these programs, however, is dramatically different in nature and scope from DAPA. Each was implemented to provide temporary relief to narrowly tailored groups of aliens who lacked lawful status, but had a clear path to obtaining this status or were otherwise in compliance with the immigration laws until an unexpected, external event. DAPA, on the other hand, expressly applies to millions of aliens who are

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[8] Indeed, in response to this Congressional curtailment, the Executive ultimately eliminated voluntary departure entirely as a basis for work authorization. *See* Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10312-01 (Mar. 6, 1997). Thus, in the end, the example of Family Fairness is one of *Executive* acquiescence to Congress, not the other way around.

in the United States in violation of our immigration laws by their own choice. As the district court noted below, estimates suggest that only 542 to 1,029 individuals received deferred action each year between 2005 and 2010. *See* Pet. App. 321a–322a n.46. That number increased dramatically to 210,000 with DACA and now can be expected to number in the millions under DAPA. *Id.* This data alone illustrates that DAPA bears no rational relationship to the prior deferred action programs.

Under the Violence Against Women Act, Pub. L. 103-322, 108 Stat. 1902, spouses of citizens or lawful permanent residents are able to self-petition for lawful status after suffering from spousal abuse. In certain cases, a self-petitioner under VAWA was able to obtain approval of their claim for abuse, but the immigrant visa to which they would eventually become entitled was not available for issuance. In such cases, DHS and its predecessor maintained a program of granting deferred action and work authorization while the issuance of the visa was pending. These grants of deferred action are temporary and are clearly granted only to aliens for whom Congress has provided a path to lawful status through VAWA.

DHS also maintains a similar program for victims of human trafficking and other crimes seeking visas under the Congressionally authorized T and U nonimmigrant visa programs that are also markedly different than DAPA and consistent with Congressional immigration policy. *See* 8 U.S.C. §§ 1101(a)(15)(T), (U). Under these programs, aliens who make a *prima facie* showing of entitlement to lawful status as victims of human trafficking or

other crimes are granted deferred action and work authorization pending DHS's final determinations of their entitlement to immigration benefits under those status categories. As with the deferred action for approved VAWA self-petitioners, these programs are a temporary stay of enforcement, and are only extended to foreign nationals so long as they have a path to lawful status under the immigration laws.

After the devastation caused by Hurricane Katrina in 2005, the DHS instituted a program to permit foreign students studying at institutions affected by the event to remain in the United States, request deferred action, and obtain employment while they could not meet the educational requirements of their student visas. Notably, the program limited relief until February 1, 2006. After that date, any foreign student would be required to comply with the requirements of their student visas or depart the country. This was not an open-ended grant of lawful presence for foreign students to remain in the United States indefinitely, but a temporary recognition that unforeseen circumstances did not warrant removing aliens from the country who had otherwise complied with statutory visa requirements and were likely do so again by the expiration of the program.

Finally, the Executive implemented a program to grant deferred action and employment authorization to alien widows and widowers of citizens who died less than two years after their marriage. Ordinarily, foreign spouses of citizens are not eligible for permanent resident status themselves until after two years of marriage. Again, the beneficiaries of this deferred action program are a narrow class who were

otherwise present in the country legally, in compliance with immigration laws, and on the path to lawful status. This is a far cry from DAPA.[9]

Where Congress has expressly approved of the Executive's implementation of class-wide deferred action programs, it has done so only with respect to programs that are temporary and limited to foreign nationals eligible to seek lawful status in the United States. This stands in marked contrast to DAPA, which is an effectively open-ended program for granting lawful presence status to millions of foreign nationals who are not eligible to apply for lawful status. Congress has never expressly approved the use of the Executive's ability to grant deferred action as a mechanism for circumventing policy differences between the political branches of the federal government.

F. The Executive Cannot Rely Upon Existing Regulations as a Justification for the DAPA Program.

The Executive also cannot justify DAPA by pointing to an existing regulation, 8 C.F.R.

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[9] Certain *amici* have also claimed that earlier "parole" policies adopted by the Eisenhower Administration and thereafter also support a history of Congressional acquiescence to Executive discretion. *See* Amicus Br. of Former Immigration Officials at 5. But Congress restricted that authority in 1996 through IIRIRA, prohibiting parole on anything other than a "case-by-case basis" and for any reason other than "humanitarian" interest or significant public benefit. 8 U.S.C. § 1182(d)(5)(A); IIRIRA § 602, 110 Stat. at 3009-689. Again, the history confirms that DAPA is contrary to Congress's expressly stated immigration policy.

§ 247a.12, which provides work authorization to fifteen classes of aliens, purportedly "without specific statutory authorization." U.S. Br. at 63–64. Putting aside the dubious proposition that a regulation promulgated by the Executive could provide authority for action by virtue of Congressional acquiescence, this rule in fact addresses classes of aliens who arguably fall within the existing statutory regime. The fifteen categories cited by the Executive concern aliens who (1) are ***lawfully*** admitted nonimmigrants; (2) have a pending application for a statutory path to ***lawful*** status; or (3) who are present in the United States pursuant to the Executive's circumscribed authority. All of these classes are markedly different from the millions covered by DAPA.

First, nine of the fifteen classes under § 247a.12 consist of lawfully admitted nonimmigrants. *See* 8 C.F.R. § 274a.12(a)(6), (a)(9), (c)(3), (c)(5), (c)(6), (c)(7), (c)(17), (c)(21), and (c)(25). The Executive has argued elsewhere that it has express statutory authority to grant work authorization to lawfully admitted nonimmigrant aliens under 8 U.S.C. § 1184(a)(1). *See Washington All. of Tech. Workers* v. *Dep't of Homeland Sec.*, No. 14-529 (ESH), 2015 WL 9810109, at *9 (D.D.C. Aug. 12, 2015). The potential beneficiaries of DAPA, by contrast, were ***never*** lawfully admitted ***or*** the terms of their lawful admission have long expired.

Second, three of the fifteen classes consist of aliens with plausible applications for a statutory path to lawful status. Section 274a.12(c)(9) concerns those with a pending application for adjustment of

status. *See* 8 U.S.C. §§ 1255, 1255a, 1255b. Section § 274a.12(c)(10) covers those with a pending application for suspension of deportation, cancellation of removal, or "special rule" cancellation of removal. *See* 8 U.S.C. § 1254 (1996); 8 U.S.C. § 1229b; Nicaraguan Adjustment and Central American Relief Act, Pub. L. 105-100, 111 Stat. 2160, 2193. Section 274a.12(c)(16) concerns aliens with a pending application for the creation of a record of lawful admission for permanent residence. *See* 8 U.S.C. § 1259. Aliens in these three classes receive work authorizations only while their applications are pending incident to the statutory scheme.

The three remaining classes of aliens are likewise dissimilar to the potential beneficiaries of DAPA. Section 274a.12(c)(11) concerns aliens who have been paroled into the United States temporarily under 8 U.S.C. § 1182(d)(5)(A). Section 274a.12(c)(14) concerns aliens subject to deferred action, which as described above, has been used in four limited circumstances very different from those present here. *See supra* pp. 25–30. Finally, aliens under Section 274a.12(a)(11) are present under the Executive's deferred "enforced departure" program, which applies to a limited number of Liberian nationals whose Temporary Protected Status expired. The Executive has sought to justify this program pursuant to its foreign relations authority. *See* Filing Procedures for Employment Authorization and Automatic Extension of Existing Employment Authorization Documents for Liberians Eligible for Deferred Enforced Departure, 79 F.R. 59286, at 59286 (Oct. 1, 2014). Whatever the merits of that constitutional claim, it provides no similar justification for DAPA.

Accordingly, Section 247a.12 does not support the Executive's novel contention that Congress has "acquiesced" to the unlimited discretion asserted by it in DAPA or that affirmance would massively break from past practice. To the contrary, it is DAPA itself that is clearly the attempted innovation in our immigration laws and in the separation of powers.

II. THE EXECUTIVE HAS NO CONSTITUTIONAL AUTHORITY TO FASHION AN IMMIGRATION POLICY CONTRARY TO THE INA.

This Court has long recognized that the exercise of executive authority must be compatible with Congress's valid exercises of legislative authority. When executive authority is "incompatible with the expressed or implied will of Congress, [the Executive's] power is at its lowest ebb." *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, *J.*, concurring). On such occasions, the Executive "can rely only upon his own constitutional power minus any constitutional powers of Congress over the matter." *Id.*

In enacting DAPA, the Executive unquestionably acted contrary to law, with its power at its "lowest ebb." As described above, Congress has exhaustively considered the circumstances under which aliens can work in the United States and obtain benefits, as well as when aliens whose children are citizens or lawful permanent residents are permitted *ipso facto* to apply for lawful status. In extending work authorization and benefits to unlawfully present parents of citizens and lawful permanent residents, the Executive is acting in direct contravention of federal law and Congressional will. Because the

Executive here does not rely upon any residual authority under the Constitution to vary from Congressional policy goals, its action is unlawful under the *Youngstown* framework.

Notwithstanding the direct conflict between federal immigration law and DAPA, the Executive contends that DAPA is justified because Congress has not allocated sufficient resources to remove all aliens who are unlawfully present. In order to make the logical leap between the current resource limitations and the justification for DAPA, one must assume that Congress has included no measures to address circumstances in which resources are constrained. In point of fact, federal immigration law does not presume that the Executive will have to physically remove all illegal aliens from the United States. Rather, the entirety of the immigration laws create mechanisms—if enforced—through which compliance with our immigration laws can be achieved in other ways. This is demonstrated by IIRIRA's bar on aliens who had previously been unlawfully present from applying for immigration benefits for certain time periods, and by Congress's limitations on employment authorization. These provisions of immigration law impose collateral consequences on illegal aliens to discourage their unlawful entry into or continued presence in the United States. Rather than allowing the immigration system to act according to Congress's considered policy judgment, DAPA would disrupt the system of collateral consequences that Congress has mandated by creating a massive and extra-statutory exception to these provisions of law.

DAPA is an unlawful assertion of legislative authority, rather than a discretionary exercise of Executive authority. This dispute is not, however, limited to the question of whether or not DAPA complies with federal immigration law. Rather, this dispute also implicates constitutional concerns about the balance of powers between the political branches of the government.

Rather than prioritizing resources to target the removal of certain aliens, DAPA is effectively a veto on Congressional authority to regulate immigration. Such an action cannot be justified on grounds of "prosecutorial discretion." As the General Counsel of the Immigration and Naturalization Service wrote in 2000:

> ***The doctrine of prosecutorial discretion applies to enforcement decisions, not benefit decisions.*** For example, a decision to charge, or not to charge, an alien with a ground of deportability is clearly a prosecutorial enforcement decision. By contrast, the grant of an immigration benefit, such as naturalization or adjustment of status, is a benefit decision that is not a subject for prosecutorial discretion.

Immigration and Naturalization Service, *INS Exercise of Prosecutorial Discretion*, July 11, 2000, at 4, *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/Bo-Cooper-memo.pdf (emphasis added).

The DAPA memorandum does not seriously suggest that the relief it grants is motivated by a lack of enforcement resources. In fact, the DAPA memorandum notes that foreign nationals who are likely to obtain DAPA relief are already "extremely unlikely to be deported given [DHS]'s extremely limited enforcement resources." Pet. App. 415a. DAPA therefore reflects the Executive's policy determination that, in light of its separate decisions about the prioritization of resources, certain individuals who are not lawfully present in the United States should be given employment benefits despite Congress's refusal to grant them.

Additionally, the Take Care Clause of the U.S. Constitution requires the President to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. This provision of the Constitution obliges the President "faithfully" to carry out the laws that Congress has enacted and constitutes an important limitation on the independent discretion of the Executive. It recognizes that the representative system of government can result in the election of legislative and executive officials that have conflicting policy visions, and elevates the considered policy judgments of Congress over those of the Executive by forbidding the Executive from authorizing action that violates federal statutes. By effectively suspending the enforcement of our immigration laws against millions of aliens in the United States, and moreover by granting those foreign nationals benefits to which they are not lawfully entitled, DAPA violates the letter and spirit of the federal immigration law that the Executive is constitutionally obligated to enforce.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

The following members of the United States Senate respectfully join the foregoing brief as *amici curiae*:

Senate Majority Leader Mitch McConnell

Senator John Cornyn

Senator Ted Cruz

Senator Lamar Alexander

Senator John Barrasso

Senator Roy Blunt

Senator John Boozman

Senator Shelley Moore Capito

Senator Bill Cassidy

Senator Daniel Coats

Senator Thad Cochran

Senator Bob Corker

Senator Tom Cotton

Senator Mike Crapo

Senator Steve Daines

Senator Michael Enzi

Senator Deb Fischer

Senator Lindsey Graham

Senator Chuck Grassley

Senator Orrin Hatch

Senator John Hoeven

Senator James Inhofe

Senator Johnny Isakson

Senator Ron Johnson

Senator James Lankford

Senator Mike Lee

Senator John McCain

Senator Jerry Moran

Senator Rand Paul

Senator David Perdue

Senator James Risch

Senator Pat Roberts

Senator M. Michael Rounds

Senator Marco Rubio

Senator Ben Sasse

Senator Tim Scott

Senator Jeff Sessions

Senator Richard Shelby

Senator Daniel Sullivan

Senator John Thune

Senator Thom Tillis

Senator David Vitter

Senator Roger Wicker